Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of MCI for	)	CCBPol 97-4
Declaratory Ruling	)	CC Docket No. 96-98

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc., ("BellSouth") submits these Reply Comments in response to comments on the Petition for Declaratory Ruling filed by MCI in the above referenced proceeding.[1]

In its petition, MCI asked the Commission to make two determinations, neither of which, the comments show, is appropriate. First, MCI asked the Commission to "hold that, as a general matter, intellectual property rights of third parties are not implicated in the sale of unbundled network elements."[2] The comments overwhelmingly show that the Commission neither can nor should make such a determination.

Second, MCI asks the Commission to determine that, to the extent any third party intellectual property rights are implicated in the sale of unbundled network elements, incumbent local exchange carriers ("ILECs") are required to negotiate and obtain those rights on behalf of carriers requesting the unbundled network elements. The comments confirm, however, that no

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1 Petition for MCI for Declaratory Ruling (filed March 11, 1997); *see,* Public Notice, DA 97-557 (rel. March 14, 1997).

2 MCI Petition at 7.

such requirement exists, nor does it make sense for one to be imposed. Accordingly, the Commission should deny MCI's Petition.

I. THE COMMENTS OVERWHELMINGLY CONFIRM THAT THE COMMISSION CANNOT CONCLUDE THAT THIRD PARTY INTELLECTUAL PROPERTY RIGHTS ARE NOT IMPLICATED IN THE SALE OF UNBUNDLED NETWORK ELEMENTS.

Third-party owners of intellectual property rights,[3] incumbent local exchange carriers,[4] state regulators,[5] and even some carriers that have requested access to unbundled network elements[6] agree that the Commission cannot through this declaratory ruling proceeding conclude that third party intellectual property rights are not implicated in the sale of unbundled network elements. The few arguing that the Commission can or should reach such a conclusion provide no sustainable support for their contentions. The Commission clearly should refrain from granting this aspect of MCI's Petition.

Reasons the Commission cannot grant the relief requested by MCI are several. Multiple parties observed at the outset that MCI's Petition is procedurally defective[7] and that the

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[3] Northern Telecom Inc. ("Nortel"); Bell Communications Research, Inc. ("Bellcore"); Lucent Technologies Inc. ("Lucent"); *Ad Hoc* Coalition of Telecommunications Manufacturing Companies ("Manufacturing Coalition").

[4] BellSouth; Bell Atlantic and NYNEX Telephone Companies ("Bell Atlantic and NYNEX"); Ameritech Operating Companies ("Ameritech"); GTE Service Corporation ("GTE"); SBC Communications, Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SBC").

[5] Public Utility Commission of Texas ("PUCT").

[6] AT&T Corp. ("AT&T"); Sprint Corporation ("Sprint").

[7] Bell Atlantic and NYNEX at 2-3; GTE at 3; BellSouth at 2-3; PUCT at 2-3; Manufacturing Coalition at 2.

Commission lacks authority both over the subject matter of MCI's Petition[8] and over the third-party owners of the intellectual property rights.[9] Substantively, parties produced persuasive evidence that third party intellectual property rights are, or would be, implicated in at least some sales of unbundled network elements, and that the question is fact-specific and not susceptible to resolution by general rule.[10] Finally, third party vendors whose intellectual property rights are placed at risk by MCI's Petition confirm that those rights often are the vendor's most valuable assets, the protection of which is of paramount concern to the vendors.[11]

Conversely, the few parties urging the Commission to conclude that third-party rights are not implicated in the sale of unbundled network elements provide no basis upon which the Commission could reach such a conclusion. For example, the assertion that ILECs have "concocted" the notion of third party intellectual rights in unbundled network elements[12] is flatly refuted by the third parties themselves, both large and small. Lucent states:

> There may be . . . circumstances when it may be necessary and appropriate for CLECs to obtain additional or expanded licenses from equipment vendors or software vendors. These circumstances vary by contract terms and are dependent upon the nature of the intellectual property, the restrictions placed on the intellectual property in the relevant contract, and most importantly, the contemplated use by the CLEC.
>
> [A]ny Commission policies should not interfere with vendors' legal rights to protect their intellectual property and should preserve the

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8 AT&T at 3 ("The Commission has raised questions that it may not be able to answer definitively, and on which its authority may be disputed."); Ameritech at 3-4; SBC at 27; BellSouth at 5; Nortel at 5.

9 Bellcore at 2; Ameritech at 5.

10 Bell Atlantic and NYNEX at 3,5; GTE at 6; SBC at 17; BellSouth at 5; Lucent at 3.

11 Lucent at 1; Nortel, *passim.*

12 Competitive Telecommunications Association ("CompTel") at 4.

> vendors' rights to require additional licenses as may be necessary and appropriate to protect intellectual property from past, present, or future misuse.[13]

Nortel expressed similar sentiments:

> Nortel would be very concerned if the FCC ordered, or otherwise allowed, requesting telecommunications carriers to access unbundled network elements or resold services of Nortel's customers to the extent that such access would not be permitted under agreements between Nortel and its customers that may apply to such elements and services and that are designed, in large measure, to protect vendors' intellectual property, confidentiality and/or other rights.[14]

Smaller vendors also confirmed the validity of ILECs' concerns with third parties' intellectual property rights:

> In fact, manufactures *often* retain property rights in the products they sell to LECs. These rights include copyrights with respect to software, patent rights covering a specific product or the method by which the product works, technical information that constitutes trade secrets under State or Federal law, and contract rights restricting the manner in which the ILEC may use a particular product.[15]

In sum, parties simply have no basis for asserting that ILECs have "concocted" the interests of third parties.

Nor are these parties' assertions regarding ILECs' past or current treatment of vendors' intellectual property rights in connection with other offerings dispositive of whether third parties' rights are implicated in the sale of network elements.[16] As noted above, numerous parties agreed

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13 Lucent at 6.

14 Nortel at 3-4.

15 Manufacturing Coalition Companies at 3 (emphasis in original).

16 AT&T at 20-27.

that the question of whether third party rights are implicated in a given case depends on multiple factors.[17] Moreover, as Lucent points out, the "most important[] [factor is] the contemplated *use by the CLEC.*"[18] ILECs, of course, will have no control over the use made by CLECs of unbundled network elements, which easily may be beyond uses contemplated when ILECs originally obtained the equipment or software in question. Accordingly, ILECs' treatment of third party intellectual property rights when providing other services to other customers in other contexts provides no basis for resolving the general question of the existence of such rights in the context of potential uses of unbundled network elements contemplated by CLECs. "Clearly, in situations where a CLEC's use, whether pursuant to resale, access to unbundled elements or otherwise, is beyond the scope of the original license or causes the originally intended license restrictions to be violated, an expanded or separate license would be required."[19]

II. ILECs ARE NOT, AND SHOULD NOT BE, REQUIRED TO NEGOTIATE INTELLECTUAL PROPERTY LICENSES ON BEHALF OF REQUESTING CARRIERS.

MCI and parties supporting it erroneously assert that where third party intellectual property rights are implicated by the sale of unbundled network elements, the burden does or should fall upon incumbent LECs to negotiate and obtain licenses on behalf of requesting carriers. Contrary to these parties' claims, Section 251(c)(3) of the Act[20] does not obligate ILECs to undertake such a responsibility. Nor have these parties presented any convincing reason

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17 See note 10, *supra.*

18 Lucent at 6 (emphasis added).

19 Lucent at 6.

20 47 U.S.C. § 251(c)(3); The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

requesting carriers would be unduly burdened by obtaining their own licenses where necessary. Indeed, to the contrary, comments show that practicalities and other factors dictate that requesting carriers should negotiate on their own behalf. Accordingly, the Commission also should reject this aspect of MCI's Petition.

Section 251(c)(3) requires ILECs to provide access to unbundled elements on terms and conditions that are "just, reasonable, and nondiscriminatory." Clearly, where an ILEC controls the intellectual property rights associated with a network element, the ILEC would have to license those rights to requesting carriers consistent with that standard. Where the ILEC does *not* control the intellectual property rights, however, -- *i.e.*, where those rights are owned and controlled by a third party -- the ILEC has nothing to convey to the requesting carrier to which the Section 251(c)(3) standard could attach. Thus, application of Section 251(c)(3) to intellectual property rights not owned or controlled by the ILEC has no meaning.

Nor is the contention correct that Section 51.309(a) of the Commission's rules[21] prohibits an ILEC from requiring a requesting carrier to obtain its own license to intellectual property rights held by a third party.[22] Requiring a requesting carrier to obtain from third parties whatever licenses are necessary for it legitimately to conduct its business is no more a limitation on the use of the associated network element than is the need for the requesting carrier to hire its own technically capable personnel. Of course, ILECs may have the need to include only the former conditions in interconnection agreements or SGATs out of concern over potential exposure to

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21 47 C.F.R. § 51.309(a).

22 CompTel at 2-3.

liability for contributory infringement of third parties' rights.[23] In either case, however, the requesting carrier may reasonably be expected to go to the marketplace and obtain whatever the ILEC does not own or control that the requesting carrier needs to offer its services.

Because there is no existing requirement that ILECs obtain and convey rights that they do not have, the suggestion that the Commission adopt waiver request procedures is misplaced,[24] as is the similar suggestion that ILECs be required to "prove" to state or federal regulators that a third party's rights are implicated.[25] Both of these suggestions reflect an overly regulatory response to an issue that has a much simpler solution -- one similar to that adopted by the Texas Public Utilities Commission.[26] Requiring only that the ILEC identify and facilitate acquisition of necessary rights allows the third party holder of intellectual property rights to determine whether its rights are implicated by a requesting carrier's access to a network element and whether an existing agreement with a ILEC would permit such access.[27] If the third party concludes current licenses would not permit such access, the requesting carrier can easily negotiate directly with the rights holder. If the third party concludes that current agreements do permit such access, the ILEC can provide the network element with an added degree of comfort that the ILEC will not be subject to a contributory infringement claim.

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23 SBC at 18.

24 CompTel at 3-4.

25 LCI International Telecom Corp. ("LCI") at 6-8.

26 PUCT at 3-6.

27 BellSouth disagrees that an ILEC has a "unique ability to interpret ambiguous provisions of its license agreements." Sprint at 5. Owners of intellectual property rights are the ultimate arbiters, short of litigation, for deciding whether a use or potential use of intellectual property will be deemed a permitted or infringing use.

None of the commenting parties has shown that requiring a requesting carrier to negotiate directly with a third party, where necessary, imposes any undue burden on the requesting carrier. Indeed, it is laughable for the likes of AT&T to assert that it needs ILECs to negotiate on its behalf because of their "superior bargaining position."[28] Nor do the "sky is falling" arguments of TRA[29] and others[30] that the burden of negotiating licenses will be so substantial as to foreclose entry into local markets carry any weight. As a number of parties pointed out, the magnitude of occurrence of the need for direct licenses is much more nominal that MCI's Petition and others' comments suggest,[31] and any purported burden would be commensurately smaller.

Similarly, concerns over "protracted and likely contentious negotiations"[32] are greatly exaggerated. Carriers and vendors negotiate procurement and licensing agreements every day, and nothing has been offered to suggest any reason negotiation of licenses to permit access to network elements would be uniquely difficult. Indeed, Nortel, for one, has confirmed its readiness to enter into reasonable licensing agreements with requesting carriers, where necessary.[33] No need exists for ILECs to pursue these agreements on behalf of requesting carriers.

Finally, in that subset of cases in which a separate license for a requesting carrier is necessary, practical and other considerations dictate that the requesting carrier negotiate on its own behalf. SBC identified a number of difficulties that would arise from a ILEC attempting to

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28 AT&T at i.

29 Telecommunications Resellers Association ("TRA") at 6-8.

30 LCI at 4-5; AT&T at 13-15.

31 SBC at 18-21; Lucent at 2-5.

32 TRA at 2.

33 Nortel at 8-9.

negotiate on behalf of a requesting carrier.[34] For example, differences are sure to arise over whether an ILEC secured a license of sufficient scope or at an appropriate rate.[35] Indeed, the likelihood of requesting carriers' dissatisfaction with ILECs negotiating on their behalf is reflected in LCI's assertion of a need for the Commission already to impose regulatory requirements on ILECs' negotiation activities.[36] Rather than embarking upon that course (which would require a rulemaking rather than a declaratory ruling proceeding), the Commission should simply acknowledge that the principles at issue here are primarily of contract and intellectual property rights of third parties. The Commission should avoid imposing -- under the "guise" of enforcing the Communications Act[37] -- regulatory constraints on third parties' rights to protect and profit from their intellectual property.

CONCLUSION

Comments on MCI's Petition confirm that third party intellectual property rights may be implicated by the sale of network elements and that the Commission cannot declare those rights not to exist. The comments also disprove MCI's contention that ILECs are, or should be,

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34 SBC at 21-27. *See also* GTE at 7-9.

35 Some parties seem to suggest that ILECs should be required to "buy out" all implicated third party rights in order to be able to grant any necessary license. *See, e.g.*, LCI at 8 (proposing that ILECs be required "immediately to commence identifying and eliminating any alleged third party claim"); AT&T at 7-8 (asserting ILECs could "avoid any infringement [concerns] by negotiating any amendments to its license agreements that it deems necessary"). Clearly, of course, any such "buyout" would be materially more expensive than individual licenses, having to cover a wide range of potential scopes and uses. Just as clearly, to the extent the cost of the buyout attributed to a license granted to a requesting carrier is higher than would have been the cost of an individual license of limited scope or use, the requesting carrier will object to the fee as being a charge for which the carrier receives no benefit. The Commission should avoid imposing requirements that are more likely to foster such differences than to resolve them.

36 LCI at 8.

37 Ameritech at 7.

required to negotiate licenses for those rights on behalf of requesting carriers. Accordingly, the Commission should dismiss MCI's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of May, 1997 served the following parties to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.

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